No. 78-411

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 574 F. 2d 926. The opinions of the Interstate Commerce Commission (Pet. App. 50a-116a) are reported at 354 I.C.C. 129 and 214.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a) was entered on May 30, 1978. A petition for rehearing was granted in part and denied in part on July 31, 1978 (Pet. App. 45a-47a). The petition for a writ of certiorari was filed on September 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether a railroad's failure to accept a financial assistance offer during the six-month negotiation period prescribed by the Railroad Revitalization and Regulatory

Reform Act may create "substantially changed circumstances" permitting the Commission to reopen an order authorizing the railroad to abandon a line.

STATEMENT

1. Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127, added Section 1a(6) to the Interstate Commerce Act and thereby prescribed a new procedure for the abandonment of railroad lines. That Section[1] now provides that a railroad may not abandon a line unless the Interstate Commerce Commission determines that abandonment is consistent with the public convenience and necessity. Whenever the Commission finds that the public convenience and necessity permit abandonment, it must publish that finding in the Federal Register. Thirty days after such publication, the Commission issues a certificate of abandonment allowing discontinuance of service unless it determines that a "financially responsible person" (including a governmental entity) has made a financial assistance offer meeting statutory standards.[2]

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[1]On October 17, 1978, President Carter signed into law the Revision of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337, which recodifies the Interstate Commerce Act. Under the recodification Section 1a(6) will appear eventually as 49 U.S.C. 10905. For purposes of clarity, we refer to the statutes by their old numbers in this brief.

[2]Under Section 1a(6)(a)(ii) of the Act, the financial assistance offer must:

> (A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or
>
> (B) cover the acquisition cost of all or any portion of such line or railroad * * *.

If an offer has been made, the Commission must postpone issuance of its abandonment certificate "for such reasonable time, *not to exceed 6 months*, as is necessary to enable such person or entity to enter into a binding agreement * * *." Section 1a(6)(a); emphasis added. If the parties notify the Commission that an agreement has been consummated, then the Commission "shall postpone the issuance of [such] a certificate [of abandonment] for such period of time as such as agreement (including any extensions or modifications) is in effect." *Ibid.*

2. The Commission adopted a regulation stating that it might exercise options other than issuance of the certificate of abandonment if the six-month negotiation period should expire without resulting in a financial assistance agreement. One of the options is that the Commission can "reopen the underlying abandonment or discontinuance proceeding to reevaluate the application on its merits in light of the financial assistance offer." 49 C.F.R. 1121.38(i)(2)(ii).

In an accompanying report, the Commission stated that its reopening regulation is authorized by Section 17(9)(g) of the Act, 49 U.S.C. (1976 ed.) 17(9)(g), which empowers it to "reopen any proceeding" on grounds of "substantially changed circumstances." The Commission stated that a reasonable subsidy offer made to but rejected by a railroad changes the circumstances on which the abandonment decision rests and warrants reconsideration (Pet. App. 75a). It also stated that "this power to reopen proceedings will be used sparingly, and only upon evidence of clear recalcitrance on the part of the applicant carrier" (Pet. App. 75a).

3. The court of appeals set aside the Commission's reopening regulation.[3] The court concluded that Section

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[3]The court also set aside several other portions of the Commission's regulations. The ICC does not seek review of these aspects of the court's decision (Pet. 8 n.5).

1a(6)(a) limits the time that the Commission may delay abandonment proceedings and that reopening of such proceedings after expiration of the six-month negotiation period conflicts with the statutory plan. The court contrasted the abandonment procedures under the new statute with earlier legislation granting the Commission power to postpone abandonment while a reasonable assistance offer was outstanding, and it concluded that omission of a comparable provision under the new statute was deliberate (Pet. App. 11a):

> What is a reasonable time [to postpone abandonment] * * * was for Congress to decide in light of its apparent determination to grant relief from the prolonged administrative proceedings that had attended abandonment and discontinuance.

The court pointed out that the Commission does not take the prospect of financial assistance into account in deciding whether to authorize abandonment, and it concluded that the failure of the parties to agree on an amount of financial aid therefore could not be a materially changed circumstance authorizing the Commission to reopen the abandonment proceedings (*id.* at 10a-11a).

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of any other court. For the reasons we discuss at pages 11-12, *infra*, there is no basis for the Commission's apparent belief that this decision by itself will have a substantial effect on the course of future abandonment proceedings. There is, therefore, no reason for this Court to grant review.

1. The Commission recognizes that reopening of abandonment proceedings would "have the *effect* of postponing the issuance of [the abandonment] certificate" beyond the six months prescribed by the statute for

negotiations (Pet. 12; emphasis in original). It argues, however, that the Commission must stand ready to reopen in order to ensure that railroads "negotiate in good faith with a local community seeking to preserve its rail service" (Pet. 9). The Commission finds its power to defer or prevent abandonment and to enforce a "good faith bargaining" rule in Section 17(9)(g) of the statute, a general reopening provision.

The Commission's use of a general reopening provision in this manner substantially undermines the procedure for abandonment spelled out in some detail in the recent legislation. See Pet. App. 37a-43a. Section 1a(6)(a) of the new Act provides that a certificate of abandonment shall issue within six months once a determination has been made that abandonment is consistent with the public convenience and necessity. Postponement of the issuance of the certificate is permissible after expiration of that period only if a financial assistance agreement has been executed. In the absence of such a voluntary agreement, administrative delay in the issuance of the certificate conflicts with the explicit congressional determination that postponement is "not to exceed 6 months."

a. The six-month statutory limitation is a significant departure from the prior congressional approach to subsidy offers. The Regional Rail Reorganization Act of 1973, 45 U.S.C. (Supp. V) 744(b) and (c), prohibits abandonment of a railroad line if a reasonable subsidy offer is outstanding.[4] Under this statute, which still applies to the eastern railroads, Congress effectively

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[4]Following the Penn Central bankruptcy in 1970, Congress enacted the Regional Rail Reorganization Act of 1973, 45 U.S.C. (Supp. V) 701 *et seq.*, to reorganize railroads in the northeastern United States. Lines not selected for inclusion in the final system plan were eligible for abandonment under 45 U.S.C. (Supp. V) 744(b). No such line could be abandoned, however, if a "financially responsible person" offered a reasonable rail continuation subsidy. Once such an offer was made, rail services had to be continued indefinitely. See 45 U.S.C. (Supp. V) 744(c).

required railroads to accept subsidy offers meeting certain prescribed standards. By contrast, the 1976 statute provides that the making of a specified minimum subsidy offer simply allows the Commission to postpone abandonment for a period, not to exceed six months, during which the parties may attempt to negotiate a voluntary financial assistance agreement. The statute does not require agreement, let alone agreement on the minimum acceptable terms set by Section 1a(6)(a)(ii).

The Commission's assertion of power to reopen an abandonment proceeding after expiration of the negotiation period rests on the two assumptions: that (a) the railroad must accept any reasonable offer, and (b) an offer is reasonable if it satisfies the minimum amounts specified in Section 1a(6)(a)(ii). As the court of appeals recognized (Pet. App. 11a), however, the deliberate omission of a "cram-down" provision in the new Act, and the strict limitation of the period of postponement to six months,[5] indicate that Congress did not intend to require the parties to agree on any particular amount of subsidy, let alone to agree on the minimum offer that is necessary to obtain even the six-month deferral of abandonment.

The Commission has a substantial role to play in determining whether the public interest justifies abandonment. But the statute gives the Commission only two limited duties once it has made such a finding: (a) if the Commission finds that a reasonable subsidy offer has been made, it is empowered to postpone abandonment for

[5]The strict prohibition on postponements beyond "six months" cannot be attributed to inadvertence. Comparision of the language in Section 1a(6) with the language in Section 1a(3) indicates that Congress knew how to provide the Commission with power to postpone abandonment for indefinite periods when it wished to do so. Under Section 1a(3) the Commission may postpone abandonment for a "reasonable period of time" in specified situations.

a period not to exceed six months; and (b) the Commission shall determine the extent to which the financial assistance offer meets minimum statutory standards (Section 1a(7)).[6] Having performed these two duties, the Commission's function is completed and the parties are left to negotiate. Congress has provided an extended six-month negotiation period and has required railroads to supply financial information to facilitate the negotiation process. See Section 1(a)(6)(b). Nothing in the statute provides that the Commission has a role to play in policing "recalcitrance" or forcing railroads to accept subsidy offers that they find insufficient. If Congress had intended the existence of an offer, deemed "reasonable" by the Commission, to be binding on the railroad, it surely would have used the model of the 1973 statute rather than the model of the contractual process.[7]

The Commission's position ultimately must be that railroads *must* accept, as a subsidy, any offer that is sufficient under Section 1a(6)(a)(ii) to trigger the six-month bargaining period; otherwise the Commission's reference to railroads that seek greater subsidies as "recalcitrant" would have no meaning. The Commission evidently sees a threat to reopen as a means to ensure that railroads will accept the lowest possible subsidy offer.

[6]The Commission's duty under Section 1a(7) is to determine whether a reasonable subsidy offer has been made that would prevent the railroad from operating at a loss and permit it to earn a prescribed rate of return. Thus, the six-month postponement of abandonment of an unprofitable line cannot take place unless the subsidy offer is minimally acceptable and there is something to negotiate about. This determination by the Commission sets a floor to assure that time is not wasted on futile offers, and it also determines the extent to which federal funds may by used to supply the subsidy for a particular line.

[7]Even the National Labor Relations Act, which contains a requirement of "good faith bargaining," does not authorize the NLRB to compel the parties to agree or to fix the terms of contracts. See, *e.g.*, *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249 (1974).

In our view, the statute is read more naturally as setting a minimum subsidy offer without which even the six-month delay for negotiation is unnecessary. The statute does not, however, fix a particular subsidy that guarantees continuation of service. Congress has left the negotiation of an acceptable subsidy to the contractual process. The requirement of a minimum subsidy offer just to open negotiations implies that the bargaining will go up from there. If the mimimum opening offer were also the maximum on which a railroad may insist, there would be no role for the dickering that the statute contemplates. If the railroad were required to accept the minimum offer specified by Section 1a(6)(a)(ii), we would expect to find both a "cram-down" provision like that in the 1973 Act and no private bargaining. The fact that the 1976 statute establishes bargaining and contains no "cram-down" rule thus is telling. And if, as we argue, a railroad is entitled to seek more than the statutory minimum, then the railroad's failure to accept an offer at the minimum cannot amount to "recalcitrance" or authorize the Commission to revoke the authorization to abandon.

b. In the absence of express statutory support for the Commission's interpretation, only a clear expression of legislative intent would warrant curtailment of the contractual freedom contemplated by the statute. The Commission's citation to general statements in the legislative history regarding the importance of local rail services (Pet. 9-10) is insufficient. Those statements are entirely consistent with the interpretation of the statute adopted by the court of appeals—Congress believed that the interests of local communities and railroads alike would be served through voluntary agreements negotiated within six months and subsidized in part by the federal government. Congress expected that, if the line in question is beneficial to the community, then it would offer a subsidy large enough to allow the railroad to continue service at a profit. Congress further contemplated that, if the line in question is not beneficial enough to induce the community to make such an offer, then the line would be abandoned.

Legislation that would have given the Commission a role in the negotiation process was considered and rejected by Congress.[8] As the court of appeals emphasized, the Commission failed in an attempt to persuade Congress to amend the Act so that it could exercise supervisory power over the negotiation process (Pet. App. 10a).[9] It would be inappropriate to interpret the Act to give the Commission a power it could not obtain from Congress. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 732-733 (1975).

c. The Commission contends that the purpose of the new statute was "to [give] States and local communities the ability to preserve [railroad] services" (Pet. 9). Although it is true that Congress contemplated that railroad services would be preserved in many cases, it is equally true that Congress intended the new legislation to revitalize a "sagging railroad industry" by removing unduly cumbersome regulation and increasing the attractiveness of railroads to investors. See *Baltimore & O.C.T. R.R.* v.

[8] H.R. 12891, 93d Cong., 2d Sess. (1974) and H.R. 7681, 94th Cong., 1st Sess. (1975) would have empowered the Commission to "order continued operation of the line * * * on the condition that the subsidy is provided."

[9] See *Hearings on Rail Amendments of 1976 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 48 (1976). The amendment that the Commission unsuccessfully advocated was described by Acting Chairman Clapp as follows (Pet. App. 10a n.9):

> * * * removing the phrase "not to exceed 6 months" gives the Commission the discretion to extend for a longer period of time the issuance of an abandonment certificate if the circumstances of a particular case make such an additional extension reasonable. This amendment addresses the very real problem of a railroad simply refusing to negotiate in good faith for the statutory six-month period and thus successfully preventing the making of a subsidy agreement.

United States, No. 77-1714 (3d Cir. Sept. 6, 1978), slip op. 13; *Atchison, T. & S. F. Ry.* v. *ICC*, 580 F. 2d 623, 626-627 (D.C. Cir. 1978). Congress intended that some unprofitable railroad lines would be abandoned to avoid "jeopardizing the industry's already precarious economic health." It offered local authorities an "opportunity" to preserve services through financially attractive subsidy offers financed in part by the federal government. S. Rep. No. 94-499, 94th Cong., 1st Sess. 43-44 (1975). The emphasis was on the communities' *ability* to prevent abandonment by offering attractive subsidies, not on a guarantee that any particular subsidy offer would be enough. The contractual process authorized by the statute strikes the balance deemed appropriate by Congress to adjust the potentially competing interests of carriers and the general public, and that balance should not be upset by inconsistent administrative action. See *SEC* v. *Sloan*, No. 76-1607 (May 15, 1978), slip op. 7-13; *Morris* v. *Gressette*, 432 U.S. 491, 504 (1977); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 664-666 (1963).

d. The court of appeals properly concluded that the general provision of Section 17(9)(g) of the Act, which permits "reopening" of proceedings based on changed circumstances, does not authorize the Commission to extend the six-month negotiation period to police railroad "recalcitrance." For the reasons discussed above, the statute does not authorize the Commission to force railroads to accept any particular subsidy offer. Given that statutory framework, the Commission cannot properly use a general reopening power to compel the railroads to bargain in a particular way or accept a particular offer. See *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932); cf. *United States* v. *United Continental Tuna Co.*, 425 U.S. 164, 169 (1976).

Moreover, as the court of appeals pointed out (Pet. App. 10a-11a), the possibility of a financial assistance offer is not one of the factors on which the initial

abandonment decision is based. Under Section 1a(4), that decision turns on whether the proposed abandonment is consistent with the public convenience and necessity and whether abandonment would seriously impair rural and community development. Financial subsidy offers are not considered at this juncture, and the subsequent occurrence and non-acceptance of an offer is not logically a "change" in the circumstances underlying the initial decision. None of the circumstances pertinent to the original decision has "changed." If new factors not involved in the original abandonment decision—indeed, factors that statutorily cannot be involved in the original decision—could be raised months later to forestall abandonment, the goal of finality in the administrative process would be seriously eroded.

2. Although we believe that the decision of the court of appeals is correct, we would not oppose the Commission's petition if the decision would strongly influence the number of railroad abandonments. Even though this case involves no question beyond the construction of a single statute, a dramatic increase in the number of abandonments would affect many communities and would deserve this Court's attention.

But we do not believe that the threat of reopening is necessary to prevent a number of unjustified abandonments. The decision of the court of appeals means only that the Commission cannot impose a ceiling on subsidy offers and require railroads to accept them. Communities desiring to preserve railroad services may continue to make subsidy offers based in part on funds provided by the federal government and based in part on their own resources. See S. Rep. No. 94-499, 94th Cong., 1st Sess. 107-109 (1975). The Commission has no experience with a system of free bargaining and no ground for predicting that railroads will obstinately refuse to accept these subsidies.

There is no reason to suppose that communities will decline to offer attractive subsidies. If the benefits of a branch line to the community exceed the railroad's losses in operating that line, it should be to the advantage of railroad and community alike to agree on a subsidy and keep the line running.[10] It may be, of course, that the Commission's rule would strongly influence, in some cases, the amount of the agreed-on subsidy, but that is not a sufficient reason for this Court to grant review in the absence of some showing that the Commission's rule would strongly influence the number of cases in which agreement would be reached.

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[10]In theory, of course, abuses could occur in the negotiation process. For example, suppose that a railroad had annual branch line losses of $1,000,000 and that the line produced annual benefits of $2,000,000 to a local community. Free bargaining would lead to a subsidy somewhere between $1 million and $2 million, but it is not possible to predict in advance where in that range the subsidy would fall. The railroad, using a threat to abandon, might insist on the whole $2 million, even though that would produce a supracompetitive return on investment. Conversely, the community, using a threat to leave the railroad with its losses, might threaten to pay nothing. The railroad might decline an otherwise profitable offer—accepting the loss from abandoning one line—in order to establish the credibility of its threat to abandon other lines and thus to enhance its ability to obtain supracompetitive returns from other communities. The railroad's short term losses might be outweighed by long-term gains in bargaining concerning other lines proposed to be abandoned. Whether such abuses of the railroad's bargaining leverage would occur in arm's-length negotiation, surrounded by the pressure of concerned public opinion and disciplined by competition from other kinds of carriers, is difficult (if not impossible) to anticipate. Cf. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 742-743 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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